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Supreme Court of the United States

OCTOBER TERM 1957

No. 10

WILLIAM GIGLIO AND FRANK LIVORSI,
Petitioners,

—against—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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Supreme Court of the United States

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WILLIAM GIGLIO AND FRANK LIVORSI, *Petitioners,* —*against*— UNITED STATES OF AMERICA.	No. 10

BRIEF FOR PETITIONERS

Opinion Below

The opinion of the court of appeals (R. 2963) is reported in 232 F. 2d 589.

Jurisdiction

Jurisdiction rests on 28 U. S. C. § 1254. The judgment of the court below was entered on April 20, 1956 (R. 2972-3). Timely application for rehearing was made on May 4, 1956 (R. 2987), and was denied on May 10, 1956 (R. 2996-7). Petition for certiorari was filed on June 6, 1956. This Court granted certiorari on October 15, 1956 (R. 3003).

Constitutional Provisions and Statutes Involved

United States Constitution:

> "No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. * * *."
>
> (Fifth Amendment)

> "In all criminal prosecutions, the accused shall enjoy the right to a * * * trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, * * * to be confronted with the witnesses against him * * *."
>
> (Sixth Amendment)

Section 145(b) of the 1939 Internal Revenue Code, Act of May 28, 1938, 52 Stat. 513 (now § 7201 of the 1954 Code, Act of Aug. 16, 1954, 68A Stat. 851, with immaterial variations):

> "* * * any person * * * who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Section 182 of the 1939 Internal Revenue Code, Act of May 28, 1938, 52 Stat. 521 (now § 702 of the 1954 Code,* Act of Aug. 16, 1954, 68A Stat. 239):

> "In computing the net income of each partner, he shall include, whether or not distribution is made to him—
>
> (a) ***
>
> (b) ***
>
> (c) His distributive share of the ordinary net income or the ordinary net loss of the partnership * * *."

---

*The Senate Committee Report (83d Cong., 2d Sess., S. Rep. No. 1622 [1954] 376) notes that § 702 of the 1954 Code, although somewhat different in terminology from § 182 of the 1939 Code, "represents no change in current law and practice."

Section 3793(b)(1) of the 1939 Internal Revenue Code, Act of Feb. 26, 1926, 44 Stat. 116, 117 (now § 7206 of the 1954 Code, Act of Aug. 16, 1954, 68A Stat. 852, with immaterial variations, except that the punishment has been reduced to a fine of not more than $5,000 and imprisonment for not more than three years, or both, together with the costs of prosecution):

> "Any person who wilfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return * * * shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return * * *) be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Questions Presented for Review

As to Petitioners Giglio and Livorsi:

1. Where six indictments are dismissed by the district court because of the violation of defendants' constitutional privilege against self-incrimination before the grand jury and a superseding indictment containing identical counts is found by another grand jury, may the defendants be deprived of all opportunity to ascertain whether the superseding indictment was predicated upon tainted evidence?

2. Where the government has obtained and used evidence in violation of the defendants' constitutional privilege against self-incrimination, upon whom does the burden rest of demonstrating that the government's evidence at the trial did or did not have an independent origin?

3. Where the defendants have established the violation of their constitutional privilege against self-incrimination and some use by the government of evidence obtained thereby, may affidavits submitted by the government, denying the further use of tainted evidence, be employed to foreclose defendants' inquiry, by confrontation and cross-examination, regarding the use of tainted evidence at the trial?

4. Did the district court err in refusing to turn over to the defendants, for inspection and use in cross-examination, statements and reports made to Treasury agents by David Lubben, one of the government's principal witnesses, as well as the filed copies of his 1946 personal and corporate income tax returns and his grand jury testimony?

As to Petitioner Liversi:

5. In the absence of a tax deficiency, may a defendant be convicted of wilfully attempting to defeat and evade his tax by filing a false return, under § 145(b) of the 1939 Internal Revenue Code, because of alleged fraudulent omissions in the return?

6. May a defendant be convicted, under § 145(b) of the 1939 Internal Revenue Code, of an attempt to defeat and evade the payment of his tax by concealment of assets, where no element of the alleged offense occurs within the territorial jurisdiction of the district court in which the case is tried?

7. Does proof of the withdrawal of moneys, charged to an employee on the books of a corporation, establish an attempt by such employee to defeat and evade the payment of the corporate tax, by misappropriating, converting and diverting corporate assets, under § 145(b) of the 1939 Internal Revenue Code?

8. Did the government establish Livorsi's participation in a conspiracy to violate the 1939 Internal Revenue Code?

Statement

The petitioner Giglio was found guilty by a jury on all of the eight counts of the indictment in which he was named as a defendant (R. 2735) and was sentenced to a total of fifteen years' imprisonment (R. 2741). The petitioner Livorsi was found guilty on the four counts in which he was named as a defendant (R. 2735) and was also sentenced to a total of fifteen years' imprisonment (R. 2741).

Howard M. Lawn (petitioner in No. 9) was found guilty on each of the three counts in which he was named as a defendant and was sentenced to a year and one day on each count, to run concurrently (R. 2761). Louis Roth, an accountant, pleaded guilty to nine counts of the indictment several months before the trial (R. 3), appeared as a witness in behalf of the government (R. 981) and, after the trial, received a suspended sentence with probation for five years (R. 8). A mistrial was declared, and the indictment dismissed, as to the defendant American Brands Corporation (R. 2747) when the jury failed to include any finding with respect to it in the verdict (R. 2735).

1. The Indictment

The ten-count indictment found in 1953 (R. 10-21) alleges the customary conspiracy and two categories of substantive offenses under the 1939 Internal Revenue Code, one category involving the filing of false income tax and information returns and the other the concealment and misappropriation of assets.

i. *The Returns*

The indictment (R. 10-21) charges that Giglio and Roth violated Title 26, United States Code, § 3793(b)(1), by wilfully and knowingly aiding, [illegible]ing in, procuring, counselling and advising the preparation and presentation: (a) of a false information return in behalf of a partnership, known as Eatsum Food Products Company, Ltd., for the fiscal year ending May 31, 1946 (Count 1); (b) of a false information return in behalf of a partnership, known as Tavern Fruit Juice Company, for the fiscal year ending March 31, 1946 (Count 2); (c) of a false consolidated return, for a corporation known as American Brands Corporation, for the calendar year 1946 (Count 4).

The indictment further charges that Giglio and Roth violated Title 26, United States Code, § 145(b), by wilfully attempting to defeat and evade a large part of the income tax: (a) of the defendant Giglio, by filing a false individual income tax return for the year 1946 (Count 5); (b) of American Brands Corporation and certain related corporations, all named with the prefix "American," by filing the consolidated return for the calendar year 1946 mentioned in Count 4, in that the said corporations were not an affiliated group of corporations within the provisions of Title 26, United States Code (Count 3).

The defendants Livorsi and Roth were charged with violating Title 26, United States Code, § 145(b), by wilfully attempting to defeat and evade the defendant Livorsi's individual income tax for the year 1946, by filing a false income tax return (Count 6).

ii. *The Alleged Concealment of Assets*

In addition, the indictment alleges that the defendants Giglio, Roth and Lawn concealed "the assets" of William Giglio and thus wilfully attempted to defeat and evade the

payment of the taxes due and owing by the defendant Giglio for the calendar year 1946 (Count 7); that the defendant Livorsi concealed "his assets" and thus wilfully attempted to defeat and evade the payment of the taxes due and owing by the defendant Livorsi for the calendar year 1946 (Count 8); and that the defendants Giglio, Livorsi, Roth and Lawn misappropriated, converted and diverted assets of the American Brands Corporation to their own use and benefit and thus wilfully attempted to defeat and evade the payment of the taxes due and owing by American Brands Corporation for the calendar year 1946 (Count 9).

iii. *The Alleged Conspiracy*

The indictment further charges that all of the defendants conspired to commit a violation of the provisions of § 145(b), Title 26 of the United States Code. All of the matters in the substantive counts of the indictment are realleged in the conspiracy count (Count 10).

iv. *The Time Factor*

The tax returns in question were for the year 1946. They were due in 1947 and were filed in September of that year. The concealment of assets is alleged to have taken place at or about the time the tax returns were due or when they were filed.

Tavern's partnership information return was for the fiscal year beginning April 16, 1945, and ending March 31, 1946 (R. 11). Eatsum's partnership information return was for the fiscal year beginning June 1, 1945, and ending May 31, 1946 (R. 10). The tax return of the "American" corporations covered the calendar year 1946 (R. 11). In their individual returns for the calendar year 1946 (R. 13, 14), the defendants Giglio and Livorsi were required to

report their respective distributive shares of income from the Tavern and Eatsum partnerships for the fiscal periods above mentioned, and their income from other sources, including the "American" corporations, for the calendar year 1946. All of the allegedly false returns were filed on or about September 15, 1947 (R. 265-6), and the prosecutor maintained that the alleged concealment and diversion of assets took place at the time the returns were filed or were required to be filed (R. 2363).

Tavern was a partnership consisting of the defendants Giglio and Livorsi and their respective wives, Margherita Giglio and Dorina Livorsi (R. 1431). It manufactured and sold imitation jellies (R. 1069) until approximately November 23, 1945 (R. 1240) when its business was taken over by American Brands Corporation (R. 1152).

During the period of the operation of Tavern, the four partners, namely, the defendants Giglio and Livorsi, and their respective wives, formed a partnership known as Eatsum Food Products Company, Ltd., with an individual by the name of David Lubben (R. 296). Lubben and his group owned 50% of the partnership; the Giglio-Livorsi group owned the other 50% (R. 300-2). Eatsum was in the candy business, it bought and sold manufactured candy (R. 295), and had a series of transactions in corn syrup as well (R. 316-20). Eatsum's business ran from approximately April or May of 1945, to some time in March of 1946 (R. 305, 362).

2. The Violation of Defendants' Privilege Against Self-Incrimination.

In 1950, three informations were filed in the United States District Court for the Southern District of New York (R. 2763-6) charging the petitioners Giglio and Livorsi, and the defendants Lawn and Roth, with offenses under the 1939 Internal Revenue Code (R. 2783-4). The

charges related to the 1946 income taxes of Giglio (R. 2783), Livorsi (R. 2784) and American Brands Corporation (R. 2783).

After the defendants pleaded not guilty, the informations were marked off the calendar, while the government continued to investigate their tax affairs, because "[i]t was decided that there were much more serious crimes involved" (R. 142). In 1952, in the midst of that investigation, the defendants were brought before a grand jury sitting in the Southern District of New York by subpoenas duces tecum, addressed to them as individuals, issued in a proceeding designated "Re: John Doe," which ordered the production of a vast quantity of books and records, including those of four firms in which Giglio and Livorsi were partners (R. 2784-8).

The defendant Giglio appeared before the grand jury (R. 2804) and, when questioned about the location of his books and records, invoked his privilege against self-incrimination on twelve occasions (R. 2815-19). He was taken by Gerome J. Leone, the prosecutor, before Judge T. Hoyt Davis for a ruling (R. 2819-20). His counsel was barred from the courtroom (R. 117) which was cleared of spectators (R. 2820). In the presence of the defendant and the grand jury, a series of questions was read to the judge relating solely to the whereabouts of *corporate* records, the prosecutor demanding that Giglio be punished for contempt of court (R. 2824) because of his refusal to answer (R. 2820-3). The following colloquy then took place (R. 2824):

> "The Court: Well, is he being investigated, himself?
>
> Mr. Leone: These various companies are being investigated, your Honor.
>
> The Court: The defendant himself is not under investigation?

Mr. Leone: Well, it is a John Doe investigation, and the witness appeared in response to subpoena duces tecum.

The Court: I see.

Mr. Leone: The witness was asked to produce certain records of certain companies, and it has been established that he was either a partner in some of these companies, or that he was an officer of the corporation.

Now, the investigation is a John Doe proceeding, and it might very well be that in time he would be the subject of an investigation—I don't say that he is not—but at the present time these companies are under investigation, your Honor.

The Court: And these corporations.

All these questions are all as to the whereabouts of the books; is that correct?

Mr. Leone: That is correct, your Honor.

The Court: Where they are located.

Mr. Leone: That is correct.

The Court: I don't see any reason why he shouldn't answer the questions."

Thus, by misrepresenting Giglio's status in the then pending investigation, Mr. Leone obtained a ruling from the court which violated the defendant's privilege not to reveal the whereabouts of his corporate books after he had made a timely claim that this testimony might incriminate him (*Curcio v. United States*, 353 U. S. ; 1 L. ed. 2d 1225). Moreover, although Mr. Leone fully understood that Judge Davis' direction related solely to corporate records (R. 2846), when Giglio returned to the grand jury room, the prosecutor directed his attention to the subject of Tavern Fruit Juice Co., a partnership in which he knew Giglio was a principal (R. 2797-8, 2809), by referring to some Tavern

papers (R. 2828), previously produced and identified by another defendant (R. 2798), and forced Giglio to state where he had found those partnership records (R. 2828).

After Giglio had been compelled to divulge several locations for the whereabouts of his corporate papers and at least one location for partnership papers (R. 2827-9), the prosecutor launched into a series of questions relating to 19 Rector Street, having learned from Giglio's previous testimony that both partnership and corporate records at one time had been kept there (R. 2811). He forced Giglio to admit that he had directed the removal of his papers from 19 Rector Street to a home he once owned in Locust, N. J., and that some of the papers might be there yet (R. 2830). Mr. Leone finally inquired: "Well you sold those premises, did you not?" and the defendant answered in the affirmative (R. 2830). The indictments subsequently voted by the grand jury charged that Giglio had concealed his assets (R. 2776) and had conspired to do so (R. 2778). This charge was repeated verbatim in the superseding indictment (R. 15, 18) and, at the trial, the sale of Giglio's house was the subject of testimony under the concealment counts (R. 954-60, 1220-32) and comment by the prosecutor in summation (R. 2046) and by the court in its charge to the jury (R. 2700).

Despite his repeated claim of the privilege against self-incrimination, and his insistence that he needed the records to defend himself on the trial of the 1950 informations (R. 2814), Giglio was "directed" by the grand jury "to bring all matters, all books and records" described in the subpoena (R. 2832). He was compelled, by the ever present threat of contempt proceedings, to produce before the grand jury "three station wagon loads," or eighty cartons, of his partnership and personal papers (R. 2836, 2846). Upon his return to the grand jury several weeks later (R. 2835), he was questioned further about his corporate records (R. 2842-5), once again raised the question of his constitutional

rights (R. 2838-9) and was taken before Judge Edward Weinfeld (R. 2845) for a direction that he answer or be held in contempt (R. 2848). He stood on his constitutional privilege "because I not only am the subject of an investigation * * * but also because I am the defendant in two informations" filed in 1950 "on tax matters, and I am awaiting trial on these informations and this investigation relating to my income" (R. 2849). He was threatened by the court with a contempt order (R. 2852), forced to reveal the corporate records he had in his possession (R. 2853), ordered to bring in everything he could find (R. 2855) and finally did (R. 2855-6). He was further compelled "to disclose the contents of his own mind" (*Curcio* v. *United States*, 353 U. S. ; 1 L. ed. 2d 1225, 1232) concerning Loraine Food Corporation and Burlan Corporation (R. 2861-4), both of which figured in the testimony introduced at the trial by the government (R. 1120-2, 1126-31, 1151-6, 1177-9, 1198-9, 1186-92, 1200-02).

3. The Dismissal of the 1952 Indictments

The 1952 grand jury found six indictments, consisting of a total of ten counts charging violations of the Internal Revenue Code (R. 2772-82). The defendants moved to dismiss on the ground that their constitutional rights had been violated before the grand jury. Judge Henry W. Goddard, recognizing the "serious constitutional issue" raised, first directed that the defendants be permitted to inspect "that part of the minutes which pertain to their interrogation before the grand juries * * * on the matter covered by these indictments" (R. 30) and then dismissed the indictments (*United States* v. *Lazen*, R. 2864, 115 F. Supp. 674),* thus indulging in what another district judge characterized as a "terrifying" exercise of discretion (R.

*The government's appeal from this order was dismissed by the court of appeals as not timely (*United States* v. *Roth*, 208 F. 2d 467).

170-2), predicated on a "plain and clear and admitted violation of the constitutional privilege" (R. 157).

Judge Goddard found that the 1952 indictments, which substituted felony charges for the misdemeanors alleged in the 1950 informations, were predicated upon tainted evidence obtained in violation of the defendants' constitutional privilege against self-incrimination. He expressly held that "the defendants were questioned concerning matters which could incriminate them," and that "the evidence obtained on the examinations of the defendants at least furnished a link in the chain of evidence needed to convict them for the crimes charged. In Giglio's case, it was procured after he had pleaded his privilege. The constitutional rights of the defendants were thus clearly violated" (*United States* v. *Lawn*, 115 F. Supp. 674, 678).

In the court below, the government conceded (Br. p. 73) that "there *was* some significant information in the partnership papers produced by appellants which may have led the 1952 grand jury to indict" (Emphasis in original). Thus, the government admitted that tainted evidence, obtained by the invasion of the defendants' constitutional privilege against self-incrimination, was used to procure the 1952 indictments.

4. The 1953 Indictment

In addition to dismissing the 1952 indictments, Judge Goddard directed the government to return to the defendants the partnership and personal records produced by them in response to the grand jury subpoenas (R. 287). The papers were impounded during the government's abortive appeal (R. 39), but not until after the present indictment had been found in 1953 (R. 31-2). The present indictment (R. 10-21) is identical with the dismissed 1952 indictments (R. 272-82), with the exception of minor allegations and recomputations (R. 89). The prosecutor was compelled to admit "the deadly parallel" (R. 149, 1322).

5. The Pre-Trial Proceedings

The defendants made a timely motion in the district court to dismiss the present indictment (R. 26) and, in connection with that motion, requested a hearing at which the court could determine whether or not the government had employed any of the tainted evidence, or leads and clues obtained therefrom, in procuring it. The defendants also sought an order suppressing the further use of any such evidence (R. 26). Upon the argument of the motion, the prosecutor, conceding that Judge Goddard's ruling was the "law of this case" (R. 149), nevertheless urged that by virtue of affidavits submitted by government agents to the effect that no use had been made of the tainted evidence (R. 92, 98, 101, 104, 107, 109), the burden was on the defendants to show that the 1953 indictment was predicated on illegal evidence (R. 152-3). Judge Edmund L. Palmieri, who heard the motion, recognized at once the "plain and clear and admitted violation of the constitutional privilege" (R. 157), characterzied the facts before him as "most extraordinary" (R. 154) and described the "performance" of government counsel (R. 169) in engaging in "an obvious concealment" from Judge Davis (R. 166) as "most amazing," "scandalous" (R. 144) and "shocking" (R. 169). He nevertheless denied the relief sought by the defendants (*United States v. Giglio*, 16 F. R. D. 268) solely on the basis of the affidavits submitted by the government agents (R. 181-2), although he had set the matter in proper perspective, on the oral argument, by indicating that if he were to "accept those affidavits and swallow them whole without further investigation" he would be placing himself "in a position of being a rubber stamp to the Prosecutor's office" (R. 170) and by adding: "I do not feel that I am here to accept blindly ex parte statements where there has been no opportunity for cross-examination and proper inquiry * * *" (R. 174).

That phase of the defendants' pre-trial motion which sought suppression of the use of leads and clues obtained by the government from the production of defendants' books and records and oral testimony before the grand jury in violation of their constitutional rights under the Fifth Amendment (R. 26), in effect, was referred to the trial court (R. 183).

6. The Proceedings at the Trial

At the trial, the defendants renewed their motion to dismiss the indictment (R. 244) and to suppress the evidence illegally obtained, as well as any leads or clues which the government might have derived therefrom (R. 245-6). All efforts by the defendants to obtain a hearing by the trial court, either in the presence or absence of the jury, (R. 1315-22, 1344-7, 1354-6, 1944-5, 2077-8, 2085-6, 2116, 2136-7), concerning the evidence used *before the grand jury*, or at the *trial*, were resisted by the trial court "in the absence of any further foundation" (R. 1356).

The trial judge's reasons for so ruling were that he was bound by Judge Palmieri's decision (R. 2085), and that if the matter were presented to him *de novo* he would rule the same way on the basis of affidavits of government agents (R. 2955-62) denying the use of tainted evidence or leads and clues therefrom (R. 247-8).

7. The Conviction

The trial of the indictment began before a court and jury sitting in the United States District Court for the Southern District of New York on January 11, 1955, and ended on February 18, 1955, with the jury's verdict of guilty against both of the petitioners on each count charged (R. 2735). The petitioner Giglio was convicted on Counts 1, 2, 3, 4, 5, 7, 9 and 10 (R. 2735). The petitioner Liversi was convicted on Counts 6, 8, 9 and 10 (R. 2735).

8. The Sentence

On March 11, 1955, the petitioner Giglio was sentenced to a term of imprisonment totaling fifteen years (R. 2741):

(i) Five years on Count 10 (conspiracy), to run *consecutively* with five years on Count 1 (Eatsum partnership return), to run *consecutively* with a further five years on Count 3 (filing false American Brands consolidated return).

(ii) Five years on Count 2 (Tavern partnership return), five years on Count 5 (Giglio personal return) and five years on Count 7 (concealment of Giglio's assets), all to run concurrently with the sentence imposed on Count 1."

(iii) Five years on Count 4 (evasion by filing American Brands consolidated return) and five years on Count 9 (diversion of American Brands assets), to run concurrently with the sentence imposed on Count 3.

On the same day, the petitioner Livorsi was sentenced to a term of imprisonment totaling fifteen years (R. 2741):

(i) Five years on Count 6 (Livorsi personal return), to run *consecutively* with five years on Count 9 (diversion of "American" assets), to run *consecutively* with a further five years on Count 10 (conspiracy).

(ii) Five years on Count 8 (concealment of Livorsi's assets), to run concurrently with the sentence imposed on Count 6.

9. The Trial Motions

The defendants moved for judgment of acquittal at the close of the government's evidence (R. 2113), renewed their motion for judgment of acquittal at the close of the entire case (R. 2504-5), moved for judgment of acquittal not

withstanding the verdict (R. 2737, 2755), for a new trial (R. 2738, 2748-53) and in arrest of judgment (R. 2743, 2756).

Summary of Argument

I. The petitioner Giglio was a defendant in a pending criminal tax case, as well as the quarry in a continuing tax investigation, when he was subpoenaed before the grand jury and compelled, by threat of contempt and in complete disregard of his repeated claim of the privilege against self-incrimination, to disclose the whereabouts of partnership and personal papers, to produce and to deliver to the grand jury a vast quantity of those papers, to divulge information about the sale of his home, which became the basis, in part, for the charge that he concealed his personal assets and conspired to do so, to testify concerning the whereabouts of his corporate records, to describe the corporate records which he had in his possession and to disclose, in other respects, "the contents of his own mind" with respect to his corporate affairs (*Curcio* v. *United States*, 353 U. S. ; 1 L. ed. 2d 1225, 1232).

The petitioner Livorsi, also a defendant in a pending criminal tax case and the subject of a continuing tax investigation, was compelled to testify before the grand jury without being warned that he had a constitutional right to remain silent. The government used some of the evidence thus illegally obtained to procure indictments, in 1952, against the defendants, charging violations of the 1939 Internal Revenue Code. These indictments were subsequently dismissed by the district court because of the flagrant violation by the government of the defendants' privilege against self-incrimination. When the grand jury subsequently found a superseding indictment, in 1953, containing identical counts, the district court first refused to

afford the defendants an opportunity to ascertain whether tainted evidence had been employed in its procurement and then refused to afford the defendants an opportunity to ascertain whether such evidence was employed by the government at the trial in order to convict them.

The invasion of a constitutional privilege by the government should entail, at the very least, the consequences which follow a violation of § 605 of the Communications Act, Act of June 19, 1934, 48 Stat. 1103 (cf. *Nardone* v. *United States*, 308 U. S. 338). Heretofore, the Second Circuit Court of Appeals had placed the burden upon the prosecution, once wiretapping was established, to prove that the information so obtained, did not lead, directly or indirectly, to the discovery of any evidence introduced at the trial (*United States* v. *Goldstein*, 120 F. 2d 485 [2 Cir., 1941], affirmed on other grounds, *Goldstein* v. *United States*, 316 U. S. 114; *United States* v. *Coplon*, 185 F. 2d 629 [2 Cir., 1950]). That burden is not discharged by the submission of affidavits by government agents (cf. *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116, 123).

Here, not only was the government's burden of proof completely disregarded by the district court, but the defendants were denied the right of confrontation and cross-examination (*United States* v. *Coplon*, *supra*, at pp. 637-8) solely on the basis of *ex parte* affidavits submitted by government agents denying the use of tainted evidence. The defendants were precluded from ascertaining whether evidence, tainted by virtue of the violation of their privilege against self-incrimination, or leads and clues derived therefrom, had been employed against them at the trial or to procure the superseding indictment.

II. After a thoroughly confusing charge by the court in connection with the central accusation of the indictment, namely, that the defendants each had filed false personal

income tax returns for the year 1946, the prosecutor requested, and the court rendered, a supplemental charge to the jury which had the mathematical effect of eliminating any tax deficiency in the two individual returns. The court of appeals held that, even in the absence of an overall tax deficiency, evidence of understatement of some income was sufficient to sustain the judgment of conviction, in plain disregard of well-settled authority to the contrary in the Second Circuit and elsewhere (*United States* v. *Schenck*, 126 F. 2d 702, 704 [2 Cir., 1942]; *Legatos* v. *United States*, 222 F. 2d 678, 688 [9 Cir., 1955]; *Elfmon* v. *United States*, 209 F. 2d 642, 643 [4 Cir., 1954]). Apparently, the holding in the present case was intended as a temporary expedient, since the court below has subsequently reaffirmed the principle that the government must establish a "substantial" tax deficiency in a prosecution under § 145(b) of the 1939 Code (*United States* v. *Nunan*, 236 F. 2d 576, 585 [2 Cir., 1956]).

III. Questions of venue "raise deep issues of public policy" under the Constitution (*United States* v. *Johnson*, 323 U. S. 273, 276). Venue requirements embody a "public policy that fixes the situs of the trial in the vicinage of the crime.* * *" (*Johnston* v. *United States*, 351 U. S. 215, 220-1).

The government failed to establish the jurisdictional fact that any of Livorsi's assets were concealed for the purpose of evading the payment of his tax, in the Southern District of New York. In the court below, the government conceded (Br. p. 34) that the "only personal *asset* belonging to Livorsi as to which there is direct and positive evidence of concealment by Livorsi" was his real property located in New Jersey. [Emphasis in the original.] It is not disputed that the sale of that property and the transfer of the proceeds to Livorsi all took place outside the Southern District of New York.

IV. The government attempted to establish that Livorsi had misappropriated, converted and diverted assets of the "American" corporations through the testimony of Present, a Treasury agent, who had examined the books and records of the companies. Drawings of $57,058.33, in a nine-month period in 1947, were attributed to Livorsi on these books. There was no evidence that Livorsi actually received any of this money. There was no evidence that the book entries represented withdrawals for a fraudulent or improper purpose. The government did not even suggest that Livorsi was not entitled to be compensated as an employee of the corporation in 1947 in the same manner that he had been compensated, to the extent of $65,452.96, for the year 1946. A deduction on the corporate tax return for 1946, for compensation paid to Livorsi, was not challenged, although the return was declared fraudulent, by the government, in other respects.

Livorsi was not an officer of the corporations. He had nothing to do with the preparation or signing of the corporate return. There was no proof that he had any knowledge of the business affairs of the corporations, or that he knew that a tax was due, or that it was unpaid, or that he intentionally kept the corporations from paying the tax, or that he prevented the collection of the tax by misappropriating corporate assets. Livorsi's alleged drawings from the corporations ceased in September of 1947, and the prosecutor maintained that the corporations were still solvent when they were forced into an involuntary receivership in New Jersey in December of 1947. There was no claim that Livorsi had anything to do with the receivership.

The government failed to prove that Livorsi had misappropriated, converted or diverted assets of the "American" corporations for the purpose of evading the payment of the tax or for any other purpose.

V. An examination of the testimony at the trial concerning the defendant Livorsi, and the prosecutor's summa-

tion concerning what he deemed proven against him, demonstrates that the government failed to establish that Livorsi was guilty of participating in the conspiracy charged in Count 10 of the indictment.

VI. The defendants were prejudiced by the failure of the district court to afford them an opportunity to inspect certain reports, statements, tax returns and grand jury testimony for use in cross-examining David Lubben, one of the government's principal witnesses (*Jencks* v. *United States*, 353 U. S. , 1 L. ed. 2d 1103). In refusing even to inspect the grand jury minutes, the court observed that Lubben did not impress him as one "I need check so far as grand jury minutes are concerned." In his summation to the jury, the prosecutor described Lubben as "a perjurer and a black marketeer and practically anything else you want to talk about * * *. He certainly admitted many other crimes * * *."

The witness, who had been a prime target of the original tax investigation by the Treasury Department, admitted that he had been questioned many times by the agents about his tax returns and "about everybody's tax return"; that "many statements" had been taken down and that he had been asked "many, many questions"; that he had been questioned "upside down and backwards" and that he did not know what he had been asked. The government admitted that the statements taken were very voluminous, but opposed their production on the ground that they were the confidential records of investigations by law enforcement officers. Lubben's tax returns, his testimony before the grand jury and his voluminous reports and statements to the Treasury agents clearly related to his testimony at the trial and to his motive for testifying, which was to exculpate himself from his own income tax difficulties. The defendants were entitled to their production and inspection with a view to use on cross-examination (*Jencks* v. *United States*, *supra*).

Argument

I.

THE REFUSAL OF THE DISTRICT COURT TO PERMIT THE DEFENDANTS TO ASCERTAIN WHETHER TAINTED EVIDENCE, OR LEADS AND CLUES OBTAINED THEREFROM, WAS USED AGAINST THEM AT THE TRIAL AND IN ORDER TO PROCURE THE INDICTMENT, CONSTITUTED A DEPRIVATION OF DUE PROCESS OF LAW AND VIOLATED THEIR RIGHT OF CONFRONTATION AND CROSS-EXAMINATION.

The defendants were compelled to give oral testimony and to produce partnership and personal books and records, in plain violation of their privilege against self-incrimination. This evidence, the government conceded in the court below, was used before the 1952 grand jury in order to indict them. The indictments having been dismissed because of the misconduct of the government, the defendants were entitled to a hearing, in order to determine, by confrontation and cross-examination, whether the tainted evidence, or any leads and clues obtained therefrom, was subsequently employed by the government, either to procure an almost identical superseding indictment or to obtain judgments of conviction at the trial. The refusal of the district court to afford the defendants this opportunity was violative of those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions * * *" (*Hebert* v. *Louisiana*, 272 U. S. 312, 316).

1. The district court not only refused to place upon the government the burden of establishing the independent source of its evidence but compounded the error by denying the defendants any opportunity to demonstrate that such evidence was tainted. The court of appeals held that it

rested in the sound discretion of the district court to refuse the petitioners a hearing; that the mere fact that Judge Goddard dismissed the 1952 indictments because of the use of illegal evidence did not entitle the defendants to a hearing as a matter of law; that this was particularly so in the face of "the strong adverse showing made by the affidavits of the prosecution" (R. 2970). The cases cited by the court of appeals in support of these propositions, namely, *Nardone* v. *United States*, 308 U. S. 338; *Goldstein* v. *United States*, 316 U. S. 114, affirming *United States* v. *Goldstein*, 120 F. 2d 485 (2 Cir., 1941); and *Lapides* v. *United States*, 215 F. 2d 253 (2 Cir., 1954), actually support the petitioners' position. See also: *United States* v. *Coplon*, 185 F. 2d 629 (2 Cir., 1950).

In *Nardone* (308 U. S., at p. 341), this Court outlined the procedure for adjudicating the rights of a defendant in a wiretapping situation: (1) In the first instance, the defendant has the burden of showing that his telephone wires have been tapped; (2) if he does, the trial judge must give him an opportunity to prove that the government's case is tainted; (3) then the government is to be afforded an opportunity to convince the trial court that its proof had an independent origin.

In *Goldstein*, the first two requirements had been met. The defendant proved the taps and "some use of them" in touching off the confession of a co-conspirator. Judge Learned Hand (120 F. 2d, at p. 488) interpreted *Nardone* to require that the government then assume the burden of demonstrating, at a hearing, that its other evidence had an independent origin. In affirming the judgment of conviction in *Goldstein* (316 U. S. 114, 122), upon the ground that the defendants had no standing to challenge the use of leads and clues because they were not parties to the intercepted communications, this Court had no occasion to pass on the burden of proof.

In *Coplon*, the defendant met only the first requirement, namely, proof of illegal interception, not a subsequent "use." Judge Learned Hand (185 F. 2d, at p. 636), after reviewing the *Nardone* and *Goldstein* decisions, concluded that the "accused has the burden of proving that the prosecution has in fact 'tapped' his wires; but, if he succeeds in doing so, the burden falls upon the prosecution to prove that the information so gained has not 'led,' directly or indirectly, to the discovery of any of the evidence which it introduces." He observed that his court would adhere to this principle "until we are told that it is wrong" (id.).

In *Coplon*, the court of appeals placed the burden of proof squarely upon the government for violating a statute forbidding interception and divulgence of telephone communications, although the defendant was guilty of conduct affecting our national security. Here it has abandoned the doctrine, without being "told that it is wrong," in an income tax prosecution where the government has flagrantly invaded the constitutional rights of the defendants. The court below presents us with this paradox without mentioning its decision in *Coplon*, while it insists that it is following its own pronouncements and a precedent in this Court.

In *Lapides*, there was no dispute over the principle that a defendant is entitled to a preliminary hearing on the issue of whether the government has obtained evidence illegally during the course of his voluntary disclosure of tax delinquency. The majority (215 F. 2d, at pp. 256-7) held that the defendant had waived the right to offer evidence. Judge Frank (id., at p. 257) found that he had not and held that it was error to dismiss the application without granting him the opportunity to prove his claim "on oral evidence, including open-court cross-examination of adverse witnesses."

2. The proposition enunciated by the court of appeals in the instant case that conclusory affidavits, submitted by

government agents, to the effect that they had not used tainted evidence before the grand jury, or at the trial, were sufficient to deprive the petitioners of a hearing and of the right to examine the witnesses, runs counter to decisions both of this Court and of the court of appeals itself. See: *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260; *United States* v. *Hayman*, 342 U. S. 205, 223; *United States* v. *Pisciotta*, 199 F. 2d 603 (2 Cir., 1952). In *Accardi*, this Court ordered a hearing despite a finding by the Court of Appeals for the Second Circuit that the moving papers asserted a mere "suspicion and belief" regarding the alleged wrongful conduct of the government (347 U. S. at p. 265). Here petitioners have established not a mere "suspicion and belief," but the actual invasion of their constitutional rights, and the use of the evidence so obtained, which places the burden upon the government of demonstrating the independent origin of its evidence. Such a burden is not discharged by ex parte affidavits of the very agents who were responsible in the first instance for the violation of those rights.

In *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116, 123, the "chief argument made by the State" in support of the dismissal of a habeas corpus petition, was that the court below was not required to grant a hearing to the defendant because "our answer contradicted the allegations in the petition * * *." This Court flatly rejected the argument, holding (at p. 123) that the petitioner could not "be denied a hearing merely because the allegations of his petition were contradicted by the prosecuting officers."

The refusal of the court below to permit the defendants "to call all the affiants * * * and cross examine them with respect to this issue" (R. 2080-7) deprived them of the right of confrontation guaranteed by the Sixth Amendment to the United States Constitution. In *United States* v. *Coplon*, 185 F. 2d 629, 637, the "only relevant inquiry" according

to the court, was whether the trial judge erred in not permitting the defense to examine certain records which "he read *in camera* and on which he in part based his finding that the 'taps' had not 'led' to any evidence introduced at the trial." In reversing the judgment of conviction, Judge Hand pointed out that the records examined by the court were competent only because they were a substitute for the testimony of the agents who had monitored the telephone conversations; that if the prosecution had not been in possession of these records and had been obliged to rely upon the testimony of the monitoring agents, "it would certainly have been constitutionally necessary under the Sixth Amendment to examine them openly and in court; even their depositions could not have been used, to say nothing of examining them *in camera*." (pp. 637-8).

Here the government has kept its agents off the witness stand, to avoid cross-examination by the defendants, by the simple device of submitting affidavits to the trial court. The examination *in camera* denounced in *Coplon* is no worse than the trial by affidavit approved of here. Neither procedure accords with the express mandate of the Sixth Amendment or with the fundamental principles of justice which are the foundation of all of our civil and political institutions.

3. The nature and effect of the affidavits submitted by the government in opposition to petitioners' application for a hearing were misconstrued by the court of appeals. These affidavits did not set forth "the sources of the evidence used in obtaining the 1953 indictment," nor did they demonstrate that said indictment "was not based upon the alleged illegally obtained material," as the court below found (R. 2969). Theodore Present, the revenue agent in charge of the tax audit and computation (R. 83), merely mentioned certain "categories of documents" which the government

claimed that it had prior to the 1952 grand jury proceedings (R. 84). He referred in general terms to certain bank records, and his other "categories" consisted of books and records obtained from third persons, those allegedly abandoned by defendants and those obtained from a receiver in the State of New Jersey (R. 84).

The affidavit of James J. Twohig, the special agent in charge of the prosecution (R. 93), merely alleged that by the end of 1950, the government had collected "a mass of documents" from various sources, all previously mentioned in Present's affidavit, plus one additional source, namely, "government agencies" (R. 95). The affidavits offered no further description of the documents and failed to designate which, if any, had been used "in obtaining the 1952 indictment." There was no demonstration whatever that this indictment was free from taint.

Similarly, the affidavits submitted by the agents to the trial judge, to the effect that no tainted evidence had been used at the trial, consisted entirely of conclusory allegations (R. 2948-62).

4. *United States* v. *Venuto*, 182 F. 2d 519, 522 (3 Cir., 1950), flatly rejected the government's contention that defendant "must prove affirmatively the exact prejudice" caused by the court's interference with his right to confer with counsel during a trial recess. *Coplon* v. *United States*, 191 F. 2d 749, 759 (D. C. Cir., 1951),* held that the government's interception of telephone conversations between the defendant and her attorney invalidated the trial "regardless of whether prejudice was shown to have resulted * * *."

In *Glasser* v. *United States*, 315 U. S. 60, 76, this Court said

*This was another prosecution of the defendant involved in *United States* v. *Coplon* in the Second Circuit.

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

Perhaps, in the hierarchy of our fundamental rights, the privilege against self-incrimination occupies a position inferior to the right to the assistance of counsel. Nevertheless, a violation of the privilege demands, at the very least, the consequences which follow a violation of § 605 of the Communications Act (Act of June 19, 1934, 48 Stat. 1103). "* * * it would be a curious result, if a violation of the section were more sweepingly condemned than a violation of the Constitution" (*United States* v. *Goldstein*, 120 F. 2d 485, 490). In either case, the burden is on the government to establish that the evidence used at the trial (or to procure an indictment) is not tainted.

The court of appeals observed, in *United States* v. *Coplon*, 185 F. 2d 629, 638, that "it may seem to have been a flimsy grievance" to deny defendant the opportunity to demonstrate that the wiretapping did lead, or might have led, to her conviction and that "it is extremely unlikely that she suffered the slightest handicap" when the trial judge withheld from her the papers which he had read *in camera*. The judgment of conviction, nevertheless, was reversed, Judge Learned Hand writing:

> "But we cannot dispense with constitutional privileges because in a specific instance they may not in fact serve to protect any valid interest of their possessor. Back of this particular privilege lies a long chapter in the history of Anglo-American institutions. Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens."

5. There are compelling reasons for requiring the government to assume the burden of proving the independent source of its evidence once the taint has been established.

As the court of appeals pointed out in *Goldstein* (120 F. 2d, at p. 488), the wrongdoer who mingles the consequences of lawful and unlawful conduct should disentangle them and must bear the prejudice of its failure to do so; it is unfair to throw upon the innocent party the duty of unravelling the skein which the guilty party has snarled; to impose that duty upon the prosecution is particularly appropriate for it necessarily has full knowledge of just how its case has been prepared; all possible doubts must be resolved against the wrongdoer.

These rules are dictated by "very practical considerations" (*United States* v. *Bonanzi*, 94 F. 2d 570, 572 [2 Cir., 1938]) and they have proven sound in actual practice. For example, in *United States* v. *Lipshitz*, 117 F. Supp. 466 (E. D. N. Y., 1954), the defendant, indicted for tax evasion, moved to suppress evidence on the ground that the revenue agent, who called on what purported to be a routine investigation, was really acting with a view to criminal prosecution. The government submitted affidavits in opposition denying that any information obtained by the agents resulted in evidence establishing the criminal liability charged in the indictment. The district court refused to resolve the issue on affidavits and ordered a hearing, after which the motion to suppress was granted (132 F. Supp. 519 [E. D. N. Y., 1955]).

Two further instances of the soundness of these rules are provided by the present case:

(i) The defendants' motion before Judge Goddard to dismiss the 1952 indictments was opposed by a sworn statement of the then prosecutor* in which he categorically denied "any and every allegation that might be contained in the respective affidavits of the individual defendants concern-

*Affidavit of Gerome J. Icone, sworn to January 15, 1953, p. 2; which is part of the unprinted Record on Appeal in *United States* v. *Roth*, 208 F. 2d 467. See Item 6, stipulation of May 29, 1953, in connection with said appeal (R. 2875-6).

ing my examination of them before the grand jury even *suggesting* any impropriety on my part" [underscoring in original], and maintained that the "proceedings were as a matter of law entirely proper and within the provisions of the Fifth Amendment of the United States Constitution." In a brief submitted to Judge Goddard, the government stated (pp. 4-5) "as categorically denied in the affidavit of Gerome J. Leone, submitted to this court, nothing improper took place before the grand jury * * *."

According to the doctrine now enunciated by the court of appeals, these categorical statements by a government attorney should have precluded further inquiry. Judge Goddard, nevertheless, refused to accept the affidavit of a government agent as binding upon him, held a hearing at which the grand jury minutes were made available to the defendants and then dismissed the indictments because of the violations revealed by the minutes.

(ii) After he had pleaded his privilege against self-incrimination before the grand jury, Giglio was forced to admit the sale of his home in Locust, N. J. (R. 2830). The indictments found against him in 1952 included a substantive count charging that he had concealed his assets for the purpose of evading the payment of taxes (R. 2776), a charge which was repeated in the conspiracy count (R. 2778). These charges subsequently appeared verbatim in the superseding indictment (R. 15, 18), were the subject of extensive testimony at the trial (R. 954-60, 1220-32) and finally were commented upon extensively in the prosecutor's summation (R. 2040). The independent source of the evidence used at the trial was never established. In the court of appeals, the government made an "offer of proof" (Br. p. 64, see text and footnote) concerning the source of this evidence, as well as the source of items of evidence challenged by the petitioner Lawn. This belated "offer of proof"

emphatically underscores the necessity for the hearing which the defendants were denied in the district court.

6. The decision of this Court in *Costello* v. *United States*, 350 U. S. 359, did not sanction the use of tainted evidence to procure an indictment, nor did it sanction the procurement of an indictment by such means followed by a refusal to permit the aggrieved defendant to ascertain whether his constitutional rights have been violated.

Even if that decision sanctions the use of tainted evidence to indict, it affords no justification either for the use of tainted evidence at a trial or for the erection of an impenetrable barrier to prevent the defendant from discovering such use. The refusal by the district court to permit the defendants, during the trial, to ascertain, from the only witnesses who had knowledge of the vital facts, whether the government was using tainted evidence, or evidence obtained by virtue of leads and clues derived therefrom, constituted error.

7. The statement by the court of appeals (R. 2970) that "appellants had a right of full cross-examination during the trial as to the sources of government exhibits and that they exercised this right on a number of occasions," is refuted by the record. The petitioners were accorded the right of cross-examination only with respect to certain third parties, namely, vendors of merchandise to one of the defendants' business entities, who were called in connection with a very limited phase of the government's case* and who obviously did not know whether the government had been "led" to them as a result of the tainted evidence (R. 1631-2,

*These witnesses were called in connection with the government's claim that one of the partnerships (Tavern) had omitted a closing inventory of merchandise, purchased from these vendors, from its information return (R. 23).

1648-51, 1657-8, 1662). When, on the other hand, the defendants attempted to examine the only witnesses who had knowledge of the vital facts, namely, Roth, Present and Leone, they were promptly and sharply foreclosed by the trial court.

Roth, Present and Leone were the key witnesses on this issue. They were thoroughly familiar with all of the defendants' books and records, including the tainted evidence produced before the 1952 grand jury. Roth had kept these books and records in the course of his employment by the defendants' business entities (R. 984-5, 1096). Present, in behalf of the government, took charge of the eighty cartons of documents which the defendants were illegally compelled to produce (R. 84-5). He inventoried the papers, then analyzed and audited them (R. 86). Leone presented the case to the 1952 grand jury and, after the indictments had been dismissed, assisted in presenting the case to the 1953 grand jury which found the present indictment (R. 102-3). The examination of these three witnesses, two called by the government and one proffered by defendants, presented the only opportunity which defendants had, at the trial, to ascertain whether the government was using leads and clues obtained from the tainted evidence. The trial court, in each instance, flatly forbade such an examination.

For example, during the cross-examination of Roth, counsel for petitioners attempted to lay the foundation for proof that tainted evidence had been injected into the trial. Roth had been the accountant for the defendants throughout the period covered by this litigation (R. 984-5). He had prepared all of the questioned tax returns (R. 1076). He had been in sole charge of the books and records of the companies involved, with one exception, and in that case another accountant prepared a monthly audit and Roth verified all of the transactions (R. 1096). It is safe to assume that he

knew more than anyone else about the papers employed by the government at the trial, through his activities as an employee of the defendants and as a prospective witness for the prosecution (R. 1081, 1241). It was clear that one phase of the defendant's questioning of Roth related to an attempt to establish the tainted nature of the evidence produced by the government at the trial, for the prosecutor observed (R. 1353):

> "It is a question of—as to the admissibility of evidence, and if there is any further foundation that counsel thinks he can present to the court, I of course can have no objection to his doing so."

Indeed, after counsel for petitioners had stated: "Isn't it a fact, your Honor, that the only way we can establish whether leads and clues have stemmed from the illegal seizure is through the witnesses as they are presented to us?", the prosecutor finally assented to the interrogation of Roth concerning the government's use of tainted evidence at the trial (R. 1354), but the trial judge was adamant, ruling (id.):

> "* * * I want to keep this trial as simple as I can * * * and I don't want to get off into this question of documents, even though you might have no objection to it."

When the same question came up during the cross-examination of the government agent, Theodore Present, who had carefully assorted and analyzed the eighty cartons of partnership documents which Giglio was compelled to produce in violation of the privilege (R. 1944), and was thus likely to be thoroughly familiar with all of the leads and clues which the government might have obtained therefrom, the court observed (R. 1958):

> "Now, it seems to me that here I have the additional question of making sure there is nothing that

> has come before this jury, this trial jury, which could be attributed to improperly secured records."

Nevertheless, the court continued (id.):

> "Now, you wanted to have a hearing at this time outside the presence of the jury. Before I take that time, I would like to know what foundation there is for it * * *."

Again, on the defendants' motion to dismiss, at the close of the prosecution's case (R. 2074), the court inquired of counsel whether there was "anything in this trial before this jury that has been improperly obtained." Mr. Stryker, defendants' trial counsel, responded (R. 2077):

> "The point was really that we were not able to find out whether those things were improperly obtained or not. * * * we were not allowed, not permitted to inquire into the fact. That is the point * * *."

If it were true, as the court of appeals found (R. 2970), that the defendants "had a right of full cross-examination during the trial as to the sources of government exhibits," then the trial judge and the prosecutor, at this very juncture, would have directed counsel's attention to that fact. The trial judge did not take the position that defendants had been permitted "full cross-examination during the trial as to the sources of government exhibits." He simply held that the defendants would not be permitted such an inquiry until they established an "additional foundation" (R. 2078). He repeatedly took the position expressed in the statement (R. 1945):

> "No, Judge Palmieri said there wasn't enough foundation to start laying one * * * and I think that is about the way I feel about it."

Time after time, the court enunciated the requirement that the defendants establish a further "foundation," while

refusing to permit them to examine government witnesses who were cognizant of the facts (R. 2081). Defendants' counsel repeatedly pointed out that he had not been able to prove where the government got its evidence because of the restrictive rulings of the court. Thus, Mr. Stryker stated (R. 2081):

> "Now, where did the Government get that information. I haven't proved where they got it because, as I understand the ruling, I was not allowed to go into that inquiry * * *."

Not only did the trial judge and the prosecutor fail to protest the accuracy of this statement, but the court once again acknowledged its correctness by insisting that a further foundation be supplied before such an inquiry could be made (R. 2085). The court also ruled that defendants would not be permitted, in their direct case, to call witnesses for the purpose of establishing the government's use of tainted evidence at the trial (R. 2086-7). The defendants called Mr. Leone as their witness for the purpose of testifying on other issues (R. 2116). He had been in charge of the prosecution of these defendants from August, 1950, to July, 1953 (R. 2118), and, with another assistant, had presented evidence to the 1953 grand jury which returned the present indictment (R. 2222). The court ruled specifically that he could not be questioned with regard to the 1952 grand jury proceedings (R. 2116), with regard to leads and clues obtained by the government (R. 2136) or with regard to the affidavits presented to Judge Palmieri in which Leone and the agents had denied the use, before the 1953 grand jury, of tainted evidence (R. 2137).

8. In *Curcio* v. *United States*, 353 U. S. ; 1 L. ed. 2d 1225, this Court held that the privilege against self-incrimination is violated when the custodian of corporate

or association papers is forced "to disclose the contents of his own mind" by testifying "orally as to the whereabouts" of the records. Here, individuals who, at the time, actually were defendants in a pending criminal case—not mere witnesses or "potential" defendants (cf. *Grunewald* v. *United States*, 353 U. S. , 1 L. ed. 2d 931, 953-4)—were compelled to testify before a grand jury which was conducting a continuing investigation of the very subject matter of the then pending criminal charges. The defendant Livorsi was not advised of his constitutional rights (R. 2867, 2870). The defendant Giglio was compelled to testify despite his repeated claim of the privilege against self-incrimination (R. 2815-19, 2849). Under threat of contempt proceedings (R. 2819-20, 2848, 2852), he was compelled to reveal the sale of his property, to surrender eighty cartons of partnership and personal papers and to describe the corporate records in his possession, all in flagrant violation of his privilege against self-incrimination. Livorsi's constitutional rights were invaded by the compelled production of papers by his partner (cf. *In re Subpoena Duces Tecum*, 81 F. Supp. 418 [N. D. Cal., 1948]; *United States* v. *Linen Service Council of New Jersey*, 141 F. Supp. 511 [D. N. J., 1956]; Note, 4 *Rutgers Law Review* 771 [1957]). Whether or not each has been "compelled to convict himself out of his own mouth" (*Curcio* v. *United States*, *supra*, 1 L. ed. 2d at 1232), or by the coerced production of partnership papers, has never been ascertained because of "the hostility of the trial court to the whole scope of the inquiry" (*Nardone* v. *United States*, 308 U. S. 338, 343), despite the fact that, under all of the precedents, the burden of proof here rested squarely on the government to establish that tainted evidence was not used against them.

In connection with its supervisory jurisdiction over the proceedings of the lower federal courts, it is the "duty" of this Court "to see that the waters of justice are not pol-

luted" (*Mesarosh* v. *United States*, 352 U. S. 1, 14). When government agents have contaminated the sources of evidence, simple justice requires a convincing demonstration that no taint attaches to the evidence used to indict or to convict, with a full opportunity of cross-examination afforded to the defendants. Anything less will stultify the privilege against self-incrimination.

II.

IN THE ABSENCE OF A TAX DEFICIENCY A DEFENDANT MAY NOT BE CONVICTED OF ATTEMPTING TO DEFEAT AND EVADE HIS PERSONAL INCOME TAX BY FILING A FALSE RETURN.

Livorsi was convicted on all of the counts in which he was named as a defendant (R. 2735). The court sentenced him to a term of imprisonment of fifteen years (R. 2741). Five years of that term were based on Count 6 (evasion of personal taxes) and Count 8 (concealment of his personal assets), the sentence on these two counts running concurrently. Another five years of his term of imprisonment were based on Count 9 (diversion of assets of American Brands Corporation) and the final five years of his term of imprisonment were based on Count 10 (conspiracy).

Livorsi's conviction on Count 6 raises the question of whether the felony of evading taxes by filing a false personal return may be established under § 145(b) of the 1939 Internal Revenue Code (now § 7201 of the 1954 Code) without proof of a tax deficiency. To understand how that question arose requires a brief examination of (a) the distributive shares issue litigated at the trial, (b) the trial court's original charge to the jury (c) the prosecutor's request for additional instructions, (d) the court's supplemental charge and (e) the opinion of the court of appeals.

(a) The Distributive Shares Issue Litigated at the Trial

Whether or not there was a tax deficiency in Livorsi's 1946 tax return depended upon the amount of income he was required to report from two partnerships, namely, Eatsum Food Products Co., Ltd., and Tavern Fruit Juice Co. That issue turned entirely on the duty of a partner to report "his distributive share" of partnership income. Section 182 of the 1939 Code (now § 702 of the 1954 Code), required that in "computing the net income of each partner, he shall include, whether or not distribution is made to him * * * his distributive share of the ordinary net income" of the partnership. The most bitterly contested issues at the trial revolved about the mandate of this statute.

The government levelled a three-fold attack upon the alleged failure of the defendants Livorsi and Giglio to report their proper shares of partnership income. First, the government claimed that the wives of the defendants Giglio and Livorsi were not in fact partners and that, therefore, the defendants were required to report on their individual returns the distributive shares of partnership profits which had been attributed to the wives on the partnership information returns (R. 1887-8). Second, the government contended that the Eatsum partnership had an additional profit from corn syrup sales which had not been reported on the partnership information return (R. 1846) and which the defendants did not pick up on their individual returns. Third, the government maintained that, because of an agreement between Lubben and Giglio (not Livorsi), made at or about the time of Eatsum's dissolution (R. 399-400) and after all of the profits had been earned (R. 2479-80), which provided that Lubben would accept a smaller distributive share of partnership profits (R. 2481), both Giglio and Livorsi were required to increase their respective distributive shares of profits for income tax purposes (R. 1870-2).

The third phase of the dispute presented a pure question of law which the court of appeals subsequently summarized as follows (R. 2971):

> "* * * the contention of the government was in essence that the distributive share of the Giglio-Livorsi group had been increased from its original 50 per cent by reason of Lubben's agreement of March, 1946, to accept $117,000 in lieu of his original share, and that, therefore, the 1946 personal returns of Giglio and Livorsi correspondingly understated their income. Appellants on the other hand argued that Lubben was charged with the full 50 per cent fixed by the original partnership agreement, and that the taxable share of the Giglio-Livorsi group could not therefore exceed 50 per cent."

The defendants' position that the partners were powerless to alter their liability to report distributive shares of partnership income, by entering into an arrangement after profits were earned, is supported by sound authority. See: In the *Matter of Bell*, 219 F. 2d 442 (5 Cir., 1955); *Commissioner* v. *Goldberger's Estate*, 213 F. 2d 78 (3 Cir., 1954); *Stoumen* v. *Comissioner of Internal Revenue*, 208 F. 2d 903 (3 Cir., 1953); and *Ruprecht* v. *Commissioner of Internal Revenue*, 39 F. 2d 458 (5 Cir., 1930). Furthermore, even if this principle does not apply, it is difficult to understand how Livorsi's distributive share of Eatsum's income could be affected by an agreement between Lubben and Giglio, in which he did not participate (R. 399-400).

(b) The Trial Court's Original Charge to the Jury

Although the trial judge ruled consistently in favor of the government on the issue of distributive shares (R. 1953, 1986-8, 2000) and adversely to the defendants (R. 2448-50, 2461-2, 2479, 2483-6, 2488-97, 2506-7), he apparently continued to entertain serious misgivings about the correctness of his position down to the very end of

the trial. For, in his instructions to the jury, not having made up his mind to do so until he took the bench (R. 2725), he attempted to tidy up the distributive shares issue, only to inject irreconcilable contradictions and hopeless confusion into the charge on this vital question.

In his charge to the jury, the trial judge assumed, in rapid succession, the following positions: He told the jury that the alleged misstatement of the distributive shares of the partners in the Eatsum return turned on the government's contention that Giglio's wife and Livorsi's wife were not partners (R. 2705), when, in fact, that question depended upon two other litigated factors as well, namely, the efficacy of the dissolution agreement, between Lubben and Giglio, to reallocate these shares, and the alleged unreported corn syrup transactions. He then stated flatly that, "for the sake of simplicity," he was going to take out of the case "that element of distribution" (R. 2714) without advising the jury of the implications of this instruction, namely, that they would be concerned no longer with the question of whether or not the wives were partners, with the question of Eatsum's corn syrup profits or with the effect of the dissolution agreement between Lubben and Giglio. In the same breath, however, he advised the jury that the only unreported income they might consider from Eatsum was the amount of the corn syrup sales as to which, he told the jury, no more than 25% could be allocated to the defendant Giglio and no more than 25% to the defendant Livorsi (R. 2714).* Thus, one phase of the distributive shares issue had been put right back into the case because the only income a partner must report out of the profits of a partnership is his distributive share (26 U. S. C., § 182). Furthermore, a full 25% of Eatsum's profit could be charged to Livorsi and

*The returns of both defendants included an item of $50,000 reported as "other" income, or "miscellaneous" income, which exceeded, in each case, 25% of the alleged $140,000 corn syrup profit (Ex. 154, R. 2947, 1925).

another 25%, to Giglio only if their wives were *not* partners, which presented another facet of the distributive shares problem. Then the court referred to the disagreement "through this case" concerning whether the wives were actually partners, and added: "* * * that is something which you must come to your own conclusion on, whether in fact they were or were not actual partners" (R. 2714).

(c) The Prosecutor's Request for Additional Instructions

Before the jury retired, and out of its presence, the prosecutor attempted to clear up some of the confusion by requesting that the court eliminate "from the consideration of the jury anything with regard to distributive shares * * * ." He further suggested "eliminating from the consideration of the jury anything with regard to Eatsum in so far as the individual tax returns of Giglio and Livorsi are concerned in counts 5 and 6 * * *" (R. 2722).

When counsel for the defendants pointed out that the "elimination of the distributive shares of the Eatsum partnership at this late date raises a host of problems," the court threatened to "put them back in, if you want me to" (R. 2723). When defendants' counsel referred to government charts relating to Giglio's and Livorsi's personal tax returns (Ex. 150; R. 2943, 1897; Ex. 151, R. 2944, 1901), which were based on distributive shares of income coming out of Eatsum, and to the testimony of government witnesses in the record on that issue, the prosecutor suggested that the exhibits be stricken (R. 2724). The court, however, referring to them as "key exhibits," suggested: "You can put a sticker over the bottom of them if you want" (R. 2724). After further colloquy, the court once again suggested that these items on the government's exhibits be blotted out (R. 2729). The "key exhibits" were neither stricken nor

blotted out; the jury was not informed, in any way, that they had been altered in many vital respects by the court's charge. Under these sorry circumstances, no jury could "exercise its untrammeled judgment upon the worth and weight of testimony," which is the *sine qua non* for the use of such charts as evidence (*United States* v. *Johnson*, 319 U. S. 503, 519).

(d) The Supplemental Charge

The hopeless confusion which already prevailed concerning the individual tax returns of the defendants was about to be intensified. After the prosecutor reiterated: "We want to eliminate all income from Eatsum on Counts 5 and 6" (R. 2730), referring to the individual returns of Giglio (Count 5) and Livorsi (Count 6), the jury was called back and the court rendered a supplemental charge with respect to distributive shares (R. 2730-1):

> "Now, I spoke to you about simplifying the picture on Eatsum as to count 1 and counts 5 and 6, and I told you that in considering counts 5 and 6, where it was claimed that part of the income unreported by the defendants Giglio and Livorsi, (defendant Giglio in count 5, defendant Livorsi in count 6) was the income from Eatsum. *To simplify that, disregard any income they may have received from Eatsum in consideration of those counts, just consider them in respect to Tavern.* * * *. I hope I have made that clear. As to Eatsum, you remember there were originally two questions, whether the income from corn syrup was reported or not, the corn syrup transactions, $140 000, and whether the distributive shares were properly stated, *and I said that because of the complication of law as to distributive shares we would forget that, and so that when you get to counts 5 and 6, where it was claimed that the income received from Eatsum wasn't fully reported by the defendant Giglio and by the defendant Livorsi,*

in connection with their individual returns, I say because of that distributive share difficulty, don't consider Eatsum at all, their income from Eatsum at all in connection with counts 5 and 6." [Emphasis added].

Here was not merely the "equivocal direction to the jury on a basic issue" condemned in *Bollenbach* v. *United States*, 326 U. S. 607, 613. Here was a completely confusing and unintelligible instruction, for, with the elimination of the Eatsum income, it was no longer possible to convict the defendants of an attempt to defeat and evade the tax by filing false personal income tax returns for the year 1946. An examination of the chart introduced by the prosecution (Ex. 151; R. 2944, 1901) demonstrates exactly what the court accomplished by instructing the jury "to disregard" any income the defendants "may have received from Eatsum." According to Exhibit 151, Livorsi's income from Eatsum was $228,288.58. By withdrawing from the jury's consideration "any income * * * received from Eatsum" the court eliminated income in the amount of $228,288.58 which the government had attributed to Livorsi and which, it had contended, he should have reported on his personal income tax return for the year 1946. Since the government claimed that Livorsi had understated his net income from all sources to the extent of approximately $138,000 (R. 1904), after all adjustments in favor of the government, there obviously could be no tax deficiency for this period once the Eatsum income was eliminated.

(c) The Opinion of the Court of Appeals

In the court of appeals, the government conceded, as, indeed, it was compelled to do, that the elimination of Eatsum income would result in an overstatement of Livorsi's income on his personal tax return for 1946 "even if Tavern

or other income was found to have been fraudulently understated" (Br. p. 95). However, the government, seeking to "sustain the conviction on the afterthought that the charge did not mean what it said * * *" (*Bollenbach* v. *United States*, 326 U. S. 607, 613), contended that the court, by its instruction, had not eliminated Eatsum income *entirely*. The government argued that the prosecutor's suggestion to the court and the court's instruction to the jury merely referred to the elimination of the alleged "*understatement* of Eatsum income" (Br. p. 95). The court of appeals adopted this argument, stating (R. 2971):

> "* * * the judge instructed the jury to disregard alleged understatement of income from Eatsum in considering the counts charging the falsification of individual returns."

There is a vast difference between a hypothetical instruction to the jury that it disregard "alleged understatement of income from Eatsum" and the instruction actually given in this case that the jury disregard "any income from Eatsum." The difference is illustrated by the figures in Exhibit 151 which show that the *income* from Eatsum attributed to Livorsi amounted to $228,288.58, while the alleged *understatement* of income from Eatsum on Livorsi's return amounted to $127,164.70, the difference, of course, being accounted for by the fact that Livorsi reported $101,123.88 from this source. The prosecutor told the judge that he desired to eliminate "anything with regard to Eatsum" insofar as the individual tax returns of the defendants were concerned (R. 2722). He repeated, "We want to eliminate all income from Eatsum on counts 5 and 6" (R. 2730). When the court, in its supplemental charge to the jury, instructed them to "disregard any income they may have received from Eatsum in consideration of those counts" and added, "* * * don't consider Eatsum at all,

their income from Eatsum at all in connection with counts 5 and 6" (R. 2731), the jury had been told in the clearest and most unequivocal terms to disregard any and all income from Eatsum and not merely the alleged *understatement* of income. That the court, the prosecutor and the jury all failed to realize that the elimination of Eatsum income resulted in an overstatement of the income reported on the individual tax returns, merely emphasizes the confusion which prevailed at the trial.

The court of appeals, however, attempted to render the entire question unimportant by holding (R. 2971) that since "there was evidence of understatement of income from sources other than Eatsum, the verdict on these counts must stand." Thus, the court below enunciated the erroneous principle of law that a conviction under § 145(b) of the 1939 Internal Revenue Code for tax evasion, by filing a false return, could be sustained despite the government's failure to establish a tax deficiency. Various courts of appeals, including the Second Circuit, have ruled uniformly that the government must prove, in such a prosecution, not only a wilful attempt to defraud, but also an actual tax deficiency. See, for example: *Legatos* v. *United States*, 222 F. 2d 678, 688 (9 Cir., 1955); *Elfmon* v. *United States*, 209 F. 2d 642, 643 (4 Cir., 1954); *United States* v. *Rosenblum*, 176 F. 2d 321, 329 (7 Cir., 1949); *Rose* v. *United States*, 128 F. 2d 622, 626 (10 Cir., 1942); *United States* v. *Schenck*, 126 F. 2d 702, 704 (2 Cir., 1942); *Tinkoff* v. *United States*, 86 F. 2d 868 (7 Cir., 1937) and *Gleckman* v. *United States*, 80 F. 2d 394 (8 Cir., 1935). Apparently, the deviation of the court below related only to the instant appeal, for the principle that the government must establish a "substantial" tax deficiency in a prosecution under § 145(b) of the 1939 Code recently was reaffirmed in *United States* v. *Nunan*, 236 F. 2d 576, 585 (2 Cir., 1956);

Elcent v. *United States*, 231 F. 2d 928, 932 (9 Cir., 1956), holds that, in such a prosecution, the government "must prove that there was a tax owed to it by the defendant," citing 10 Mertens, Law of Federal Income Taxation, § 55.37, which asserts:

> "A prosecution for wilful *failure to file a return* may be maintained where there is no tax due. But no prosecution for *wilful attempt to evade or defeat a tax* is possible unless there is some tax due."
> [Emphasis in original]

(f) Summary

The determination of the correct distributive shares of the partners posed so many difficulties that the prosecutor was forced to admit "the complexity of the problem" after all of the evidence was in (R. 2728); and the trial court, after a confusing and contradictory charge to the jury, finally instructed them not to consider the income from one of the partnerships "because of that distributive share difficulty" (R. 2731) and the court of appeals described the issue as "this confusing problem in tax law" (R. 2971). Yet, Livorsi, a layman, was convicted of wilfully attempting to defeat and evade the tax by omitting from his individual return some of his distributive share of partnership net income, although the government proved nothing beyond the fact that he signed a return (R. 1247) which an accountant had prepared (R. 1248).

In an attempt to simplify an exceedingly complex situation, we have stressed this issue solely as it relates to the defendant Livorsi. With some factual variations, the same discussion applies to the defendant Giglio. The errors committed in connection with the central counts of the indictment (relating to the defendants' personal returns) concerning the distributive shares issue, which the government's expert conceded "was the real question in this law-

suit" (R. 1951), would warrant, without more, a reversal of the judgments of conviction against both of them.

III.

THE COURT BELOW LACKED JURISDICTION OF THE ALLEGED CONCEALMENT OF LIVORSI'S ASSETS SINCE NO ESSENTIAL ELEMENT OF THE OFFENSE OCCURRED IN THE SOUTHERN DISTRICT OF NEW YORK.

Livorsi was charged, in Count 8, with an attempt to defeat and evade the payment of a large part of his tax for the year 1946 by concealing his assets "at the Southern District of New York and elsewhere" (R. 15). The government failed to prove the jurisdictional fact that the alleged offense, or any essential element thereof, took place within the Southern District of New York.

All of the acts of alleged concealment, testified to at the trial under Count 8, purportedly took place outside of the Southern District of New York (R. 2057-65, 2066-9, 2070-3). The sale of a house (R. 2067) which was located in New Jersey (R. 950), the deposit of the purchase price in escrow (R. 2059-60, 2067-8) and the transfer of the cash to Livorsi (R. 2070, 2072-3) all took place in the District of New Jersey, while the correspondence in connection with the transaction, if pertinent on this issue, went from New Jersey to Long Island in the Eastern District of New York (R. 2065). Livorsi resided on Long Island in the Eastern District of New York (R. 2065, 2652). In the court below, the government admitted (Br. p. 34) that the New Jersey property was the "only personal *asset* belonging to Livorsi as to which there is direct and positive evidence of concealment by Livorsi * * *." (Emphasis in the original)

It is no answer that Livorsi's tax return for 1946 was filed in the Southern District of New York. Livorsi's alleged attempt to defeat and evade his tax for 1946 by filing a false return is the subject of a separate count of the indictment (R. 14). In *Spies* v. *United States*, 317 U. S. 492, 499-500, this Court stated that a taxpayer, who filed no return at all, might be guilty of an attempt to evade under § 145(b) of the 1939 Code, if he concealed his assets with a tax evasion motive. The filing of the return is, therefore, not an essential element of the attempt to defeat and evade payment by concealment of assets, and the fact that the return was filed in the Southern District of New York has nothing whatever to do with an attempt to evade payment by concealment elsewhere.

In an effort to supply the jurisdictional requirement by argument instead of evidence, the government urged in the court below (Br. p. 34) that "part" of the concealment of assets in New Jersey consisted of Livorsi's concealment of his tax liability in the Southern District of New York. The government carefully refrained from asserting that concealment of tax liability constituted an essential element of the offense of concealing assets. Obviously, it does not, for a taxpayer may admit his full and correct tax liability, yet still be guilty of concealing his assets. In opposition to the petition for certiorari in this Court, the government abandoned this ambiguous argument and proposed (Br. p. 26) another "concealed" personal asset (in flat contradiction of its concession in the court of appeals that the only personal asset belonging to Livorsi as to which there was direct and positive evidence of concealment, was his New Jersey estate), namely, moneys allegedly withdrawn by Livorsi from the "American" corporations. The answer to this contention is three-fold: In the first place, the alleged withdrawals do not constitute "concealment" of personal assets. In *United States* v. *Camp*, 140 F. Supp. 98, 100 (D. C.

Hawaii, 1950), the court, in a prosecution for concealing assets of a bankrupt estate, said:

> "The crime of concealment is concealment. It is not an improper use of funds, it is not the use of corporate funds for personal expenses, it is not even the use of funds in fraud of creditors."

In the second place, no one testified that Livorsi actually had received moneys from the "American" corporations. A government agent (Present) testified merely that, *according to the books*, Livorsi was charged with certain moneys from that source (R. 1916-23). There was no evidence at all concerning the disposition of these funds, or that they were concealed, or by whom, or where such concealment took place (*infra*, pp. 51 to 54).

In the third place, Livorsi was charged in another count with fraudulently diverting *corporate* assets to his own use by virtue of these very withdrawals from the "American" corporations (R. 15-16). Thus, Livorsi has been convicted under Count 9 of diverting assets which belonged to the corporations, and now the government contends that by withdrawing these very same funds he concealed his own assets. At the trial, when counsel for the defendants objected to the materiality of Present's testimony on this subject, the prosecutor made no claim that he intended to establish a concealment of personal assets. He stated merely that the evidence was "very material to the concealment of assets in the American Brands Corporation * * *" (R. 1920).

Questions of venue in criminal cases "are not merely matters of formal legal procedure. They raise deep issues of public policy * * *" (*United States* v. *Johnson*, 323 U. S. 273, 276). The issue here is fundamental, arising, as it does, under the Constitution. See: Article III, Section 2, Clause 3 (relating to state courts) and the Sixth Amendment (relating to federal courts); *United States*

v. *Johnson*, *supra*, at page 275; *Haas* v. *Henkel*, 216 U. S. 462 and *United States* v. *Borow*, 101 F. Supp. 211 (D. C. N. J., 1951). In *Johnston* v. *United States* and *United States* v. *Patteson*, 351 U. S. 215, 220, this Court held that, while under the Sixth Amendment the venue of a trial is predetermined, nevertheless, the place of the crime "is determined by the acts of the accused that violate a statute. This requirement of venue states the public policy that fixes the situs of the trial in the vicinage of the crime * * *. A variation from that rule for convenience of the prosecution or the accused is not justified. The result would be delay and confusion."

The venue objection was not waived. Where an indictment itself discloses lack of venue, a waiver arises out of going to trial without objection (*United States* v. *Brothman*, 191 F. 2d 70 [2 Cir., 1951]). Here, not only did the indictment fail to disclose lack of venue (actually, it charged expressly that the offense was committed in the Southern District of New York and elsewhere), but the government refused to afford the defendants the particularization which might have disclosed, in advance of the trial, that the alleged concealment had not taken place in the Southern District of New York.*

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*The defendants made a timely motion for a bill of particulars with respect to the concealment counts (R. 58, 62) which was denied by the district court (R. 185). The motion was renewed, and denied, before trial (R. 241-3) and as soon as the government adduced testimony on this issue (R. 953, 964). Defendants moved unsuccessfully during the trial (R. 1926-7) and at the close of the government's case (R. 2099) for a continuance in order to prepare to meet the evidence. A few days before the lengthy trial ended, and after the defendants were well into their defense, the court suggested that counsel submit ex parte summaries of "the facts relating to the key charges" for use in connection with his instructions to the jury (R. 2219) and, referring to the prosecutor's concealment counts, stated: "Well * * * it would help me * * * if I could just have his idea of the outline of what he has proven with respect to those three counts" (R. 2220). Why the judge did not have a clear idea of what the government had "proven" with respect to

A motion for acquittal, at the close of all of the evidence, properly raises the question of venue and such a motion need not specify the grounds therefor (*United States* v. *Jones*, 174 F. 2d 746 [7 Cir., 1949]) if it is not heard (*United States* v. *Brothman*, *supra*, at p. 73). Livorsi's motion for acquittal at the close of all of the evidence was denied by the court without argument being heard (R. 2505).

IV.

WITHDRAWALS CHARGED AGAINST LIVORSI ON THE BOOKS OF A CORPORATION DO NOT ESTABLISH THE CRIME OF ATTEMPTING TO DEFEAT AND EVADE THE CORPORATION'S TAX BY THE MISAPPROPRIATION OF ASSETS.

Five years of Livorsi's prison sentence rest upon his conviction on Count 9 of the indictment which alleges that he, and others, wilfully attempted to defeat and evade the payment of a large part of the taxes due and owing by American Brands Corporation for the calendar year 1946, "in that they did misappropriate, convert and divert assets of the aforementioned corporations [sic] to their own use and benefit" (R. 15-16). The tax period involved under this count was the year 1946. The return was due in 1947, during which year it was claimed that Livorsi misappropriated, converted and diverted assets of the various "American" corporations (R. 2363).

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the concealment counts, was revealed the next morning when the prosecutor stated to the court (R. 2364): "We charge concealment of all assets * * *and we do so by showing some of the assets that were concealed. *Some of them I know your Honor is familiar with, some of them a little more tricky.*" (Emphasis added)

Aside from the obvious unfairness of requiring the defendants to meet an accusation as nebulous as "concealment of all assets," it is only because the government has never been required to particularize the "tricky" items of the concealment counts that it can shift positions and try different theories as it moves from the trial court to the court of appeals and then to this Court.

With respect to this count of the indictment, the court charged the jury that they must be convinced, beyond a reasonable doubt, that the defendant knew that a tax was due from the corporation for 1946, that it was not paid, that he intentionally kept the corporation from paying its taxes, that he "made it impossible to collect the taxes by concealing the assets of that corporation or by misappropriating and diverting the assets of that corporation * * *" and that, if the defendant had not so concealed assets, the corporate tax could have been collected when it was due (R. 2717-8). The prosecution failed to establish a single one of these basic requirements against the defendant Livorsi.

Livorsi was not an officer of the "American" corporations (R. 1915). He was a stockholder of record of American Brands Corporation (R. 1912) and had a proprietary interest in the others (R. 1116) known as American Brands Wholesale Corporation, American Trucking & Forwarding Corporation, American Sweets Corporation and American Agar Corporation (R. 12). Livorsi had no connection with the preparation or signing of the corporate return (R. 1248-9). There was no testimony that he knew anything about the financial condition, or tax situation, of any of the corporations. The prosecutor admitted that he had nothing whatever to do with "the business decisions" (R. 2639).

To establish the so-called misappropriation, conversion and diversion of corporate assets during 1947, Theodore Present, the government's accountant, testified, from schedules which he had prepared from the books (R. 1920), that certain moneys were withdrawn from "the various companies, American Brands companies" from January, 1947, to "the end of their books on November 20, 1947" (R. 1916). He testified that, according to the books (R. 1920), Livorsi drew $57,058.33 in this period (R. 1917). Present then took this eleven-month period and broke it down into

successively shorter periods, all within the original January to November span. Thus, he stated that from March to November, 1947, "his schedule" (R. 1917) showed that Livorsi had drawings of $30,058.33 (R. 1922). In a still shorter period, from June 16th through November, "his schedule" showed that Livorsi's drawings were $500 (R. 1922-3). Finally, from September 15th, when the corporate tax return was filed, until the end of the period in question, Livorsi was charged with nothing (R. 1923). Present admitted that part of these "drawings" were "corporate salaries," but did not state what part was, or was not, in this category (R. 1923). Withdrawals of cash from the corporation, to which he also testified (R. 1918-23), were in no way brought home to Livorsi.

There was no evidence that Livorsi actually received any of this money. There was no evidence that any of the items represented by these book entries were for a fraudulent or improper purpose. The government did not even suggest that Livorsi was not entitled to be compensated as an employee of the corporation in 1947, in the same manner as he had been compensated as an employee in 1946 (R. 1919). Indeed, the prosecutor maintained, in his summation, that the corporations were solvent until they were forced into an involuntary receivership in New Jersey in December of 1947 (the book entries relating to Livorsi's alleged drawings had ceased in September), and that there "was plenty of money on December 2nd, plenty of assets on December 2nd," to pay all creditors, including the taxes due the government (R. 2626). Although the prosecutor contended that this receivership was "the most important single method of concealing" (R. 2627), there was no claim that Livorsi had anything to do with the receivership or was in any way involved in it. Walter Kohn, the attorney for the corporations in the receivership, stated flatly: "I never saw Livorsi" (R. 2248).

The book entries concerning Livorsi's drawings of $57,058.33 from the corporations for the first eleven months of 1947, the period in which he is charged with having misappropriated, converted and diverted corporate assets, compare favorably with his drawings of $65,452.96 for the full year of 1946, yet the government, in prosecuting another defendant for attempting to defeat and evade the tax due by American Brands Corporation for the year 1946 (R. 11), did not challenge as improper a single dollar attributed to Livorsi for 1946 on the corporations' books (R. 1919). Indeed, while Present was testifying to withdrawals appearing on the books of the "American" corporations for 1947, the crucial year, he added (R. 1919):

> "There were similar withdrawals in the year 1946, though. None of those were disallowed."

Livorsi has been convicted on this count, and sentenced to five years' imprisonment, without proof that he had any knowledge of the affairs of the corporation, or that he knew a tax was due, or that he knew it was unpaid, or that he intentionally kept the corporation from paying the tax (assuming he was in a position to compel payment), or that he prevented the collection of the tax by misappropriating assets. In short, Livorsi has been convicted without proof of a single fact from which wilfulness or intent could be inferred, and despite an admission by the prosecutor that he had nothing to do with the business decisions of the corporations and a further admission that the corporations were solvent and were able to pay all of their obligations, including their taxes, well after the drawings attributed to him ceased.

V.

THE GOVERNMENT FAILED TO PROVE THAT LIVORSI WAS GUILTY OF PARTICIPATING IN A CONSPIRACY.

Five years of Livorsi's prison sentence rest upon his conviction on Count 10 of the indictment (R. 10-21) which alleges that he participated in a conspiracy to violate § 145(b), Title 26, of the United States Code.*

(a) The Testimony

Lubben, who had been a partner in Eatsum Food Products Company, Ltd., and who testified as a principal witness for the government, when asked about a conversation with certain enumerated persons, including Livorsi, answered (R. 352):

> "Well, sir, we can eliminate Mr. Livorsi, because he very seldom ever asked or said anything about the business. He just asked how is business, that's all."

Lubben added that Livorsi was present when he asked Giglio for his 50% share of the corn syrup profits, was informed by Giglio that he did not have any money coming to him and was then ordered to get out (R. 358-9). When the prosecutor asked Lubben whether his "fear," on another occasion, was based on anything Livorsi, or others, had said to him, the witness omitted Livorsi's name in his answer (R. 377).

*In the petition for certiorari (p. 19), we stated that Livorsi's conviction on this count "raises no issue of public importance, beyond the frequently noted abuse of the conspiracy count in federal criminal prosecutions" and expressed the hope "that, if this court grants certiorari with respect to the other issues, which have an importance far beyond the particular facts and parties involved, it will review also the conviction on the conspiracy count since a five year term of imprisonment has been predicated thereon" (pp. 19-20).

Time after time, the prosecutor asked his witnesses about conversations or acts of Livorsi, along with others, and each time the witness either expressly excluded Livorsi or omitted his name from the answer (*Lubben:* R. 348, 352, 377, 397; *Roth:* R. 998, 1004, 1024, 1026, 1119, 1121, 1125, 1134, 1135, 1136, 1148, 1155, 1176-7, 1182, 1217, 1245, 1489, 1532). Bereu, Eatsum's independent accountant (R. 1688-9), who appeared as a government witness, did not even recall Livorsi and could not identify him (R. 1687). If Livorsi entered into a conspiracy, or did anything in furtherance thereof, the government's witnesses were signally silent about it.

Except for Present's testimony which consisted of summaries and computations, and apart from the evidence to which we have already referred above, the following is the sum and substance of the remaining testimony in which Livorsi's name figures: Roth thought Livorsi was present, he was "not a hundred per cent positive," at a conversation about terminating the Eatsum partnership and paying out Lubben (R. 1027-8). He testified that Livorsi signed the check for $15,000 to Lawn (R. 1021, 1073) which the government, at this trial, credited as a deduction to Tavern, consisting of a "legal fee expense allowed but not claimed" (R. 23) *reducing* the defendants' taxable income (R. 1887). Roth testified that Giglio told him Livorsi was a 50-50 partner in the companies (R. 1074). He was asked a leading question by the prosecutor, "Now, Mr. Roth, were Mr. Giglio and Mr. Livorsi officers of these various corporations * * *?" and answered, "Yes, sir" (R. 1183). He did not specify what office Livorsi is supposed to have held in any of the corporations and his testimony was refuted by corporate records (R. 1915). When asked whether he knew where Giglio and Livorsi obtained the money to purchase their homes in 1946, Roth said, "I can answer the question by recalling some of the checks drawn out of the

corporations or the businesses that were charged to their account" (R. 1090). Since the checks were charged to "their account," and no one claimed the items were not reported, this did not constitute tax evasion. Since the transactions took place late in 1945 or early in 1946 (R. 1090), they were well in advance of the crucial period (from March to September, 1947), during which the government charges that the misappropriation or diversion of American Brands Corporation assets took place (R. 2363). Roth claimed that he lied by prearrangement in the receivership proceedings in matters affecting Giglio, Livorsi, Lawn and himself (R. 1294-5), added that he spoke to Giglio and Livorsi in planning what his false testimony should be at certain unspecified "hearings" (R. 1327) and finally exonerated Livorsi of the charge of prearranging false testimony in the receivership, "I have to leave Mr. Livorsi out because he was not present" (R. 1532).

(b) The Prosecutor's Summation

The prosecutor, in summation, admitted that there was "very little testimony" about Livorsi (R. 2039). He was a 50% partner; he "wasn't the business brains of the organization. * * * he did not engage in the business decisions, and for that reason he isn't in most of the counts" (R. 2039). After enumerating three counts of the indictment, namely, Livorsi's individual return, the concealment of his own assets and the conspiracy, the prosecutor added (R. 2039):

> "Now he is not in the other counts because there is no evidence that I know of in this record at all that ties him into it, and so he isn't charged with it."

This absolved Livorsi of any complicity in filing the Giglio, Eatsum, Tavern and American Brands Corpora-

tion returns and the concealment of Giglio's assets, all of which charges were realleged in the conspiracy count.

The prosecutor then described to the jury what he considered proven against Livorsi. He stated that Livorsi "knew how much money he personally received. * * * There can't be any question about that fact" (R. 2639-40). This was a thoroughly misleading argument because Livorsi's duty to report a substantial part of his income depended upon the ascertainment of his distributive share of partnership income, not what he "personally received." He might very well have known what he "personally received" without knowing the amount of his distributive share which he was required to report. The prosecutor here was underscoring the confusion concerning the duty of a partner to report income from the partnerships which the trial judge, as we have seen, subsequently attempted, without success, to correct during the course of his charge to the jury. To this misleading argument the prosecutor added a statement which had no basis in fact when he observed that Livorsi, a 50% partner, was "entitled to receive half of all and did receive half of all" (R. 2640). There was not one word of testimony in the record concerning what Livorsi actually received. Present's computations concerning the Eatsum partnership were arrived at by deducting, from the alleged net profit of the partnership, what he claimed Lubben had received, and by then dividing the balance between Giglio and Livorsi, without regard to what they actually received and without regard to the amounts due other partners (R. 1860-1). With respect to Tavern, Present computed Livorsi's share by dividing the claimed net profits equally, without regard to what Livorsi actually received and without regard to other partners (R. 1887-8). The amount that Livorsi actually received from either partnership, if pertinent, was a matter of sheer conjecture on this record.

In the very same sentence in which he referred to Livorsi as a 50% partner, entitled to receive half of everything, the prosecutor added (R. 2640):

> "* * * and the things which relate to concealment generally, for example, such as the concealment of the American Brands Corporation assets, were just as much a concealment of assets that he had as they were a concealment of anybody else's assets, the net result of getting the money out of American Brands Corporation, part of which went to him as well as to the others, was to conceal his own assets."

Aside from the fact that the government failed completely to establish that Livorsi concealed any of the assets of American Brands Corporation, as we have seen (*supra*, pp. 51 to 54), it is sheer nonsense to argue that, when a defendant conceals an asset belonging to a corporation which might otherwise be used to pay its income taxes, he is, at the same time and by virtue of the same act, concealing his own assets which might be used to pay his personal taxes.

The prosecutor added that one of the "prime methods of concealment" by Livorsi was the failure to withhold taxes on corporate salaries (R. 2642-3) when there was not a scintilla of evidence, and the prosecutor made no claim, that Livorsi had any duty to withhold, was responsible in any way for the failure to withhold or even knew of it. To establish the basis for a mere *civil* penalty, the government must prove that the officer or employee of the corporation, against whom the proceeding is brought, was under a duty to perform the act and that he "wilfully failed to perform the duty of accounting for and paying over withholding taxes" (*Wade* v. *United States*, 48 AFTR 1220 [D. C., W. Va., 1954]).

A judgment of conviction, followed by a sentence of fifteen years' imprisonment, on "proof" such as this, represents a shocking miscarriage of justice.

VI.

THE DISTRICT COURT ERRED IN REFUSING THE DEFENDANTS AN OPPORTUNITY TO INSPECT CERTAIN REPORTS, STATEMENTS, TAX RETURNS AND GRAND JURY TESTIMONY FOR USE IN CROSS-EXAMINING ONE OF THE GOVERNMENT'S PRINCIPAL WITNESSES.

In view of the holding in *Jencks* v. *United States*, 353 U. S. , 1 L. ed. 2d 1103, this Court is requested to take cognizance of plain error, not presented in the petition for certiorari, consisting of the refusal of the district court to turn over certain statements, reports, income tax returns and grand jury testimony to the defendants for use in connection with their cross-examination of David Lubben, a crucial government witness (R. 293-909).

Lubben, who described himself as a 50% partner of the defendants in Eatsum (R. 300), told a lurid narrative. According to his story, the defendants not only had defrauded the government of taxes, but also had cheated him out of his share of substantial partnership profits. He testified that during the rationing of corn syrup in the summer of 1945, the Eatsum partnership arranged to secure a supply of the product which it sold at a combined invoice and cash price of between $900,000 and a million dollars (R. 356-7). Slightly more than half of this total was sold on invoice and entered on Eatsum's books. About $400,000 of it, however, was handled in cash and represented "traffic" through the cash box (R. 357). Out of this cash came the premium money which was used to expedite the shipment of corn syrup to Eatsum (R. 335-6), leaving a profit of approximately $140,000, half of which Lubben claimed was his (R. 358). Lubben testified that when he demanded his share of the cash box, he was told that there was no money coming to him (R. 358-9) and he received none of it (R.

358). The court instructed the jury that Count 1 of the indictment turned on the charge that Giglio wilfully omitted this $140,000 item from Eatsum's information return (R. 2705). The government also charged, in Counts 5 and 6, that both Giglio and Livorsi failed to report their distributive shares of this amount on their individual tax returns (R. 1902).

Lubben further testified that the partnership "was worth about $800,000" upon dissolution (R. 364), but that all he received was the machinery (R. 363) worth about $75,000 (R. 498) and the lease (R. 363) and that he was forced to buy the inventory for approximately $350,000 although he owned half of it (R. 363).

In the course of his direct examination by the prosecutor, Lubben blurted out (R. 368):

> "I am not trying to paint myself as any angel or anything else, sir, but I didn't want that. I was in the black market, much to my sorrow, but there was never any intent on my part to defraud the Government on income tax.
>
> I paid big taxes, and I wanted no part of this * * *."

He testified later on direct examination that, in the personal tax return which he filed for 1946, in which he should have included his distributive share of income from Eatsum and his income from two corporations which he formed immediately after Eatsum's dissolution in March of 1946 (R. 475, 485), he reported that he owed the government "around $22,000 or $25,000" in taxes (R. 372). The two Lubben corporations, which dealt in the black market (R. 644-6), grossed four or five million dollars in their first year of business (R. 480, 485, 487) and, even if the government's erroneous computations are accepted,

Lubben was under a duty to report about $124,000 of income from Eatsum for 1946 (R. 1404, 1851).*

The defendants requested the production of Lubben's 1946 personal tax return and the returns of his two independent enterprises (R. 709), in order to establish that his motive, in testifying against them, was to exculpate himself from his own income tax difficulties (R. 711, 717, 724). The court denied the application (R. 718, 724, 726).

It appeared from Lubben's cross-examination that although he had been a prime target of the original tax investigation by the Treasury Department, in some unexplained manner, he had managed to avoid prosecution. Lubben testified that two treasury agents, Twohig and Cordes, met with him for the first time in July or August, 1948 (R. 461). Thereafter, he saw Mr. Twohig "many times" (R. 462). Lubben was informed that the agents were investigating the Eatsum returns and "everybody's tax returns," including his own (R. 463). Thereafter, he saw Twohig "very many times * * * at least a dozen times" in 1948 (R. 463). Lubben met him in a government office six weeks or two months after the first visit. He did not recall whether there was a stenographer present (R. 464) or whether anybody was taking down his conversation (R. 465). After that he saw Twohig "many, many times * * *" (R. 465). He was questioned about his tax returns "many times" and "about everybody's tax returns" (R. 465). He saw Mr. Twohig seven or eight times in 1949, "[i]t could be more, I don't know" (R. 468) and the same number of times in 1950 (R. 469). He signed a statement in 1951, "maybe 1950" (R. 469). He had given statements before, many statements (R. 469). His conversations with the agents "were taken down many times; but I don't know

*The government asserted that Lubben received $124,000 of income from Eatsum. As a 50% partner, his distributive share of profits was far more.

who was taking them down" (R. 470). The agents made the notes at 253 Broadway (R. 470). He began to turn papers over to the agents in 1948 or 1949 (R. 473). Twohig asked him "many, many questions. * * * He asked me upside down and backwards, sir. I don't know what he asked me" (R. 684-5). Lubben admitted that he had testified before the grand jury in 1952 (R. 903-4).

Lubben's friendship with the treasury agents was on so firm a footing by 1950, that when he appeared, early that year, in the federal district court in the Southern District of New York, and testified falsely in a civil suit brought by a purchaser of corn syrup against the Eatsum partners (R. 376), he was accompanied by Mr. Twohig and a couple of other agents (R. 472) who knew that he lied under oath on that occasion (R. 472), although he asserted boldly, in the presence of the jury, "I am under oath" (R. 672-4) in order to lend credence to his testimony. The agents did not tell Lubben they knew he had lied. "They just looked kind of funny, sir" (R. 472). Needless to say, Lubben was never prosecuted for his perjury (R. 473).

The defendants requested that the government surrender, for the court's inspection, Lubben's testimony before the grand jury that found any indictment against them and "all written statements or stenographic statements or handwritten statuents, or any kind of statements that he made to any of the agents * * *" (R. 906). The prosecutor, in opposition, stated (R. 906-7):

> "As I understand the rulings, both of the Supreme Court of the United States and of this circuit court: there must be such a foundation laid before such documents are subject to production inasmuch as they are confidential records of grand jury proceedings and of investigations by criminal law enforcement officers."

He further objected that these records were extremely voluminous (R. 907). The court denied the application and ordered the papers sealed (R. 908). In refusing even to examine the grand jury minutes, the court observed that "this man with all of his background has not impressed me as a witness I need to check so far as grand jury minutes are concerned" (R. 731).

In his summation to the jury, the prosecutor referred to Lubben as "a perjurer and a black marketeer and practically anything else you want to talk about, though I don't know of any income tax violation that he was guilty of. * * * He certainly did not admit any. He certainly admitted many other crimes * * *; as he said himself on this witness stand, it just didn't make any difference any more" (R. 2589). He also advised the jury (R. 2590):

> "* * * incidentally, when you think Lubben got off scot-free, don't be so sure about that.
>
> Mr. Present testified that his returns back to 1940 were under examination."

Lubben already is immortalized in two opinions which were reported after he had completed his testimony at this trial. *In re Carlsen*, 17 N. J. 338, 111 A. 2d 393, 396, describes the "unscrupulous means which may not be tolerated even under market place standards" by which Lubben and his lawyer, Carlsen, induced a victim to part with $25,000 in connection with the purchase of a distillery in Puerto Rico on the false representation that they were going to put up a similar sum. *State* v. *Weleck*, 34 N. J. Super. 267, 112 A. 2d 23, 25, notes that Lubben lied at Weleck's trial about his relationship with Carlsen, swearing that it was only that of attorney and client, "when in fact newly discovered evidence will disclose both were engaged in a fraudulent business enterprise before the trial which resulted in the suspension of the attorney * * *." The opinion

also notes (112 A. 2d, at pp. 23-4) that at the trial "Lubben was thoroughly discredited on cross-examination and by direct evidence of a handwriting expert produced by the State who testified Lubben's signature to two pertinent letters were genuine after Lubben had denied these signatures."

Lubben's 1940 individual and corporate income tax returns, his testimony before the grand jury which indicted the defendants and his voluminous reports and statements to the treasury agents clearly related to his testimony at the trial and to his motive for testifying. Their "[r]elevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination" having been clearly established, they should have been made available to the defendants (*Jencks* v. *United States*, 353 U. S. 1 L. ed. 2d 1103, 1112-13).

CONCLUSION

The judgments of conviction should be set aside. The four counts of the indictment against the defendant Livorsi should be dismissed. The district court should be ordered to afford the defendant Giglio a hearing at which the government would have the burden of proving the independent source of the evidence employed to procure the indictment and the evidence to be employed at the trial. The defendant should be afforded an opportunity, as the government's evidence is introduced at the trial, to cross-examine the government's witnesses, at a hearing to be held outside the presence of the jury, concerning the use of tainted evidence. At such hearing, the defendant should be permitted to call additional witnesses, including government agents, on that issue. If the indictment is not dismissed as against the

defendant Livorsi, a reversal of the judgment of conviction and a similar hearing should be ordered in his case.

Respectfully submitted,

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